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WHAT MAKES US DIFFERENT?

*Peter Fleming Jr.**

For reasons I have yet to discover, I am a trial lawyer and have been one for over thirty years. I have tried civil cases on both sides. I was a federal prosecutor for nine years and have defended numerous criminal cases. Against this experience, the subject of this Symposium strikes me as both odd and disturbing. As far as I am concerned, "The Responsibility of the Criminal Defense Attorney" differs not one whit from the responsibility of any trial lawyer in any case. In sum, the nature of the case, civil or criminal, bears not at all on the responsibilities of the attorney as trial counsel and as an officer of the court.

As in any trial representation, a criminal defense counsel's responsibility, and first obligation, is to the client. As criminal defense attorneys, we owe our hard work, our diligence, our passion, and the best of our skills and judgment to our clients. We must do our best to convey a belief that justice may be found within a system that does not always appear to be just and that too often is not. We owe compassion, empathy, and a sense of understanding to a human being caught up in a new world that a layperson cannot possibly fathom. We owe an unflagging belief in our client's innocence or, at the least, in reasonable doubt. And where neither is possible, we owe the best possible solution short of trial. Simply put, as in any kind of case, the criminal defense counsel, like any other counsel, owes the client the greatest chance to win or, if this is not possible, an honest judgment.

But our responsibilities do not end with our clients. We owe respect and candor to the court and an honest effort on matters of law. And when they deserve it, we owe respect and courtesy to the prosecutors. Lastly, we owe just about everything to the jury, but we owe two things principally: to be fair and square with the evidence and to drive home to each juror that "not proved" means

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"not guilty." Our role, in large part, is the role of teacher. We fail in our representation unless, as the trial progresses, the jury looks to us as the source of information and enlightenment. In a real sense, we must become partners with a jury that is faced with the ultimate duty of a just verdict.

What may surprise the public, but what I am convinced is true, is that fulfilling these obligations has substantive impact. Professionalism is an essential part of persuasion and has many beneficial impacts on a case; tricks don't work. First, the client who senses true empathy and understanding and believes that justice is possible is more comfortable, more durable, and, if called, a better witness. Second, the court that comes to trust an attorney will at least listen and ponder, regardless of its final ruling. And lastly, a jury, treated with respect and candor, is more likely to find in your favor.

If I am right that these ideas are equally relevant in defending a civil case, why is the question of professional responsibility limited here to criminal defense attorneys? Are we different? Are we suspect? In a country with roots in a revolution against the abuse of power and with a concrete, actively enforced Bill of Rights, why must it be true that the defense of a criminal case and, by implication, the Bill of Rights is increasingly viewed as a kind of game?

Surely, there are many reasons for this perception, including the public feeling that crime is on the rise, that indictment means guilt, and that "technicalities" obstruct justice. This said, I suspect there is one particular reason for the focus of this Symposium, for it is the *Simpson* case that gives timeliness to the question posed. Why should this be? What I saw in *Simpson* was: (1) a group of skilled professionals who drilled holes in the prosecution's case and its witnesses; (2) a trial judge who, in difficult circumstances, did his best to be fair; (3) an overconfident prosecutor's office that rushed to judgment; and (4) a conscientious jury of decent men and women who endured sequestration and, right or wrong, found reasonable doubt.

I suggest the reaction to the *Simpson* verdict stems not from the trial itself but from its coverage. To steal from James Carville: "It's the commentary, stupid."¹

1. "Carville is the campaign strategist who helped Clinton to victory and coined the term 'It's the economy stupid' to explain it all." James Bates, *Footnotes: Words from a Ragin' Cajun*, L.A. TIMES, Apr. 26, 1993, at D1.

What did we hear?

“Dream Team.”

“Race card.”

“Judge Ito’s lost control.”

“Reasonable doubt is an extremely tough standard.”

What we did not hear was, “Hey, proof beyond a reasonable doubt is what America is all about.”

Viewed in this context, the question posed by this Symposium deserves an answer that goes beyond mere trial practice. Our responsibility as criminal defense counsel includes the responsibility to stand our ground. We must remember that defending an accused is part of defending an essential and basic philosophy of liberty, which others seem to have forgotten. Our government is not always right. Indictment does not mean guilt. Agendas do exist. Power can be abused. This is what the Founders understood. Hence, when the government decides to charge and indict a defendant, it has the obligation to prove its case—not by evidence that raises suspicion and invites speculation—but by evidence that proves guilt beyond a reasonable doubt. It is a simple idea, but nonetheless remains a basic principle of freedom: “not proved” means “not guilty.”

So, in the end, and in perspective, I was wrong. As criminal defense attorneys, we do carry a burden or responsibility that does make us different from defense attorneys in civil cases. We do not represent the accused simply because the accused deserve a defense. We represent the accused to keep the government at bay, to do everything in our power to limit the possibility of an abuse of power, and to do everything we can to make the system work. And, while I can hear the chuckling in the corridors, carrying out *that* responsibility is our public service.

